IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 891

ROY G. ANDERSON AND CURRIER & CARLSEN, INCORPORATED,
a corporation, *Petitioners*

vs.

A. ALEX SHUFORD, JR., *Respondent.*

BRIEF IN OPPOSITION
TO PETITION FOR
WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

QUESTION PRESENTED

Does a Complaint which seeks an injunction respecting certain real property, together with the enforcement of an equitable lien, a constructive trust, a resulting trust, and the appointment of a receiver over such real property sufficiently involve rights to real property so as to come within the purview of 28 U.S.C. § 1655 (1958) for venue purposes?

STATEMENT OF THE CASE

A Complaint was filed by the Respondent against Petitioners in the United States District Court for the District of Colorado on February 17, 1964. (R. 4-11.) Jurisdiction was invoked on the basis of diversity of citizenship. Neither Petitioner was a citizen or resident of the state of Colorado. Thus, Respondent sought to effect service of process under the provisions of 28 U.S.C. § 1655 (1958), it being alleged in the Complaint that the action was one to enforce a lien upon or claim to the real property described in paragraph 17 of said Complaint. (R. 1.) Under the provisions of 28 U.S.C. § 1655 (1958), where the Defendant in such a case cannot be served within the state, or does not voluntarily appear, the court may order the absent Defendant to appear or plead by a day certain.

In this connection, the Complaint contained numerous allegations regarding actions of the Petitioners, which actions affected Respondent's rights to the real property described in paragraph 17 of the Complaint. (R. 6.) In the Complaint, Respondent sought a complete adjudication of the rights of the parties to the action, an order enjoining the Petitioners from acting in a manner inconsistent with the rights of the Respondent in the real property, the enforcement of an equitable lien, together with a constructive trust, resulting trust, and such other, further, and different relief as the Court may have deemed meet and proper in the premises. Respondent further sought to have a receiver appointed to take charge of the property described in the Complaint to prevent further waste and dissipation of said property and the proceeds obtained from its sale. (R. 10, 11.)

Service of process was effected on Petitioner, Currier & Carlsen, Incorporated, by serving a copy of the Summons and Complaint on Bruce Kistler, agent for service of process for said corporation, at Denver, Colorado. Service of process was effected on Petitioner, Roy G. Anderson, by publication, pursuant to Motion and Order of the Court. (R. 14-18.)

In response to the Complaint, Petitioner, Currier & Carlsen, Incorporated, filed a Motion to Dismiss, and Petitioner, Roy G. Anderson, filed a Motion to Quash (R. 19, 20.) The Motions to Dismiss and to Quash were based primarily upon the contention that the United States District Court for the District of Colorado was not the proper venue for the action, that the Court lacked jurisdiction over the person of Roy G. Anderson, and that both process and service of process were insufficient. Memorandums in support of these Motions were filed by Petitioners (R. 20-35), after which Memorandum Briefs in Opposition to said Motions were filed on behalf of Respondent (R. 36-44.)

The main question raised by Petitioners' Motions, and the only question dealt with by the trial court, was whether the action filed against Petitioners was a local, in rem action under which the provisions of 28 U.S.C. § 1655 (1958) could be invoked, or whether the action was a transitory in personam action which would require adherence to 28 U.S.C. § 1391 (a) (1958).

The District Court, on June 22, 1964, entered an Order dismissing Respondent's Complaint on the grounds that . . . "the aims and objects of the action determine that the nature and character of this action is in personam and not in rem and is not maintainable in this venue under the provisions of Section 1655." (R. 51.)

This decision was appealed to the Court of Appeals for the Tenth Circuit. On July 27, 1965, after considering Briefs filed by both parties, together with oral argument, the Court of Appeals for the Tenth Circuit reversed the decision of the District Court. This decision has been reprinted and is contained in the Appendix to the Petition for Writ of Certiorari, beginning at page 15.

In the decision of the Court of Appeals, it was held that the Complaint essentially stated a claim to enforce a lien upon or a claim to real property within the District of Colorado and, therefore, venue within that district and service

of process were permissible under the provisions of 28 U.S.C. § 1655 (1958).

The court further found that the Complaint expressly alleged an agreement between Respondent and Petitioner, Anderson, that each was to have a share in the properties specifically described in the Complaint. The court noted that all of the allegations in a sense orbited around this alleged agreement. Thus, it was held that such an agreement, if sustained by the proof, would clearly create an interest in the land, subject to protection by a local action.

The court further stated that the extent and nature of the interest held by Respondent would be created by a pre-existing agreement and not merely by the adjudication of the Court.

On October 14, 1965, the Court of Appeals for the Tenth Circuit denied a Petition for Rehearing. This decision is reproduced in the Petition for Writ of Certiorari at pages 29 through 32.

REASONS FOR DENYING THE WRIT

The only question for determination in the case at bar is whether it was proper for the trial court to grant a Motion to Dismiss on the grounds of improper venue. As stated by the trial court in its Order: "The question here involved is one of proper venue." (R. 68.)

Thus, the litigation has not proceeded beyond the point of a Motion to Dismiss. No trial has been held on the merits and no opportunity has been afforded the Respondent to submit his evidence in a court of law relating to his interest in the real property herein involved.

On this state of the record it is submitted that the sole question presented for this Court to review is of such little significance and consequence that it does not merit this Court's attention and consideration.

Indeed, it is submitted that the question presented herein for review does not carry with it the momentous concern

throughout the Circuits that further pronouncement from this Court should be required. This is especially true in view of previous pronouncements by this Court relating to the question in the instant case.

It has already been held that actions to establish and enforce constructive trusts in specific real or personal property having its situs within the jurisdiction of the court are actions in rem or quasi in rem within the purview of 28 U.S.C.A. § 1655 (1958). *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1, 20 S.Ct. 559, 44 L.Ed. 647 (1900); *Goodman v. Niblack*, 102 U.S. (12 Otto) 556, 26 L.Ed. 229 (1881). This rule was further implied in this Court's decision in the case of *Fischer v. American United Life Ins. Co.*, 314 U.S. 549, 62 S.Ct. 380, 86 L.Ed. 444 (1942).

In *Jellenik v. Huron Copper Mining Co., supra*, an action was brought asking that a receiver be appointed to take possession of certain property and wind up the company's business. The Plaintiff further prayed for an Order enjoining the company's officers, directors, and agents from intermeddling with the property therein involved. This Court held that the action properly came under the purview of the act of March 3, 1875, Section 8, which was a predecessor and similar act to 28 U.S.C.A. § 1655 (1958). In the course of its decision, the Supreme Court of the United States pointed out that one of the objects of the suit was to remove an encumbrance or cloud upon title to shares of stock of a corporation located in the district in which suit was brought. The Court held that the shares of stock were property within the contemplation of the statute, and that venue and jurisdiction over the Defendants were proper.

Similiarly, it should be pointed out that in the instant case one of the objects of the suit is to determine rights of title in real property and to remove the encumbrance or cloud upon the title to this property. Moreover, the allegations of the Complaint clearly set forth that the real prop-

erty herein involved was to be security given as consideration for investment in the enterprises referred to in the Complaint. Thus, it is contended that *Jellenik v. Huron Copper Mining Co., supra,* is authority for the instant case.

Petitioners appear to base their Petition for Writ of Certiorari on the ground that there is a conflict between the decision of the Court of Appeals for the Tenth Circuit in the instant case and the decisions in other Circuits. Respondent contends that no such conflict, in fact, exists.

The first decision which Petitioners contend conflicts with the decision in the instant case is that of *Jones v. Gould,* 149 Fed. 153 (6th Cir. 1906). An examination of that case reveals that the only in rem aspect therein involved was that the Defendants owned stock certificates, which certificates had a situs in the jurisdiction of the Court. However, looking to both the allegations and the prayer for relief, it is seen that the controversy therein concerned the management activities of the managers. There was no controversy respecting title or claim to an interest in the stock certificates and no controversy respecting ownership of the stock. This, of course, distinguishes *Jones v. Gould, supra,* from *Jellenik v. Huron Copper Mining Co. supra,* and the instant case.

The *Jellinik* case, it is submitted, is more analogous to the case at bar and is in complete harmony with it. The controversy in the instant case involves far more than mere personal activities. Rather, it involves a claim of right in and to real property situated in this jurisdiction — the District of Colorado.

Petitioners next attempt to construe a conflict between the Tenth Circuit and the Second Circuit. The case of *Vidal v. South American Sec. Co.,* 276 Fed. 855 (2d Cir. 1921) is discussed by Petitioners, who contend that the property in the instant case was not a "security" and that there was no agreement relating to any "lien" interest.

Respondent submits that it is inconceivable that at this stage in the proceedings Petitioners can argue that the only

claim which Respondent makes to the land in question is simply as a general creditor. As pointed out in the decision of the court below, the Complaint in this case quite expressly alleges an agreement between Shuford and Anderson that each was to have a share in the property specifically described in the Complaint. "Such an agreement, if sustained by the proof, would clearly create an interest in the land, subject to protection by a local action." (Petition for Certiorari, page 21.)

An examination of the Complaint shows that the transfer of property to Roy G. Anderson was given as security for his lending money to various corporate entities. Subsequently, there was an agreement between Petitioner, Anderson, and Respondent whereby it was agreed that Respondent would also participate in lending money and would receive a share in the *securities* given to Anderson. (R. 2, 3.) Thus, it is submitted that there is clearly a security relationship in the instant case, and Respondents' claim to the real property herein involved is not merely that of a general creditor.

Additionally, it should be pointed out that in *Vidal* no claim was made to the property. The only claim made was with respect to certain alleged commissions. In the instant case, the whole Complaint revolves around the claim of interest and right in real property which is described in paragraph 17 of the Complaint. (R. 3-5.)

The case of *Dan Cohen Realty Co. v. National Sevings & Trust Co.*, 125 F.2d 288 (6th Cir. 1942) is cited by Petitioners for the proposition that the predecessor to 28 U.S.C. § 1655 (1958) and, thus, Section 1655 itself, does not apply to actions for specific performance.

Indeed, in *Dan Cohen* the court found that the gist of the relief prayed for was for a personal decree of specific performance. In the instant case, the trial judge suggested that perhaps that should be the remedy which Respondent should seek, but even the trial judge admitted that such relief was not what was being sought in the instant case (R. 71.) To the contrary, in the case at bar, as distinguished

from *Dan Cohen,* the whole relief sought revolves around an interest in real property described in the Complaint, and the agreement relating to such real property as security for loans made by both Petitioner, Anderson, and Respondent.

Respondent submits that there is no conflict whatsoever between the instant case and the decision in *Dan Cohen Realty Co. v. National Savings § Trust Co., supra. Dan Cohen* simply has no application to the instant case.

Petitioners complain and contend that the court below did not confine the provisions of Section 1655 to liens or claims which are pre-existing. In so doing, Petitioners contend that the holding in the court below is in conflict with the decision in *McQuillen v. National Cash Register Co.,* 112 F.2d 877 (4th Cir. 1940), which, Petitioners argue, held that one of the requirements for the utilization of Section 1655 is that the proceeding be in aid of some pre-existing claim and not a proceeding to create for the first time a claim to the property as the effect of the proceeding itself.

In this connection, it should be pointed out that the litigation in the instant case is to *enforce* a trust in land in which Respondent is alleged to have an interest. This interest has been in existence for some time prior to the suit in the case at bar and came about at the time Respondent agreed to engage in lending activities with Petitioner, Anderson. Thus, Respondent submits that not only is the decision in the instant case not in conflict with *McQuillen v. National Cash Register Company, supra,* but also comports with the long standing rule of this Court in *Walker v. Brown,* 165 U.S. 654, 17 S.Ct. 453, 41 L.Ed. 865 (1897), and *Seymour v. Freer,* 75 U.S. (8 Wall.) 202, 19 L.Ed. 306 (1869).

In *Walker v. Brown, supra,* the Court held that every express executory agreement in writing whereby the contracting party indicated an intention to make some particular property, real or personal, a security for a debt or other obligation, or whereby the party promises to convey or

assign or transfer the property as security, creates an equitable lien upon the property so indicated. This, said the Court, creates an in rem interest from the terms of the agreement.

Similarly, in the instant case, the in rem interest is created by virtue of the contract and circumstances of the parties and *not* merely by the litigation itself.

The case of *Seymour v. Freer, supra,* involved a contract between two persons whereby one was to furnish money, and the other to purchase lands with that money and to receive as his compensation one half of the profits on the sale of the land. This Court determined that under the facts of that case there was not merely a personal claim involved but also an equitable interest in the land, and that the parties had a joint interest in the property.

The Court found that the agreement between the parties created a charge upon the property and gave the Plaintiff a lien to the extent of the amount to which he should be found to be entitled upon the execution of the agreement. Again, the case at bar is similar to the decision of this Court in that it is the agreement between the parties which creates the interest in the land and not the litigation itself.

Petitioner submits that not only is the decision in the instant case not in conflict with *McQuillen v. National Cash Register Co., supra,* but also the decision in the instant case is in complete harmony with previous decisions of this Court in *Walker v. Brown, supra,* and *Seymour v. Freer, supra.*

Nevertheless, even if the action in the instant case were simply to impress a trust, for the first time, on the land in question, there are numerous cases which uphold venue under 28 U.S.C. § 1655 (1958) and its predecessor statutes.[1]

[1] *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1, 20 S.Ct. 102 U.S. (12 Otto) 556, 559, 44 L.Ed. 647 (1900); *Goodman v. Niblack*, 102 U.S. (12 Otto) 556, 26 L.Ed. 229 (1881); *Kelleam v. Maryland Casualty Co. of Baltimore*, 112 F.2d 940 (10 Cir. 1940), reversed on other grounds, 312 U.S. 377, 61 S.Ct. 595, 85 L.Ed. 899 (1941); *Erwin v. Barrow*, 217 F.2d 522 (10 Cir. 1954). See also *Seven Oaks v. Federal Housing Administration*, 171 F.2d 947 (4th Cir. 1948); *Midstate Amusement Corporation v. Rivers*, 54 F. Supp. 738 (E.D. Wash. 1944); *McMurray v. Chase Nat. Bank of City of New York*, 10 F. Supp. 960 (D.C. Wyo. 1935); *Anderson v. Benson*, 117 F. Supp. 765 (D.C. Neb. 1953).

Furthermore, it should be remembered that *McQuillen v. National Cash Register Co., supra,* did not specifically hold to the contrary. Moreover, *McQuillen* was a stockholder's action to cause cancellation of certain books of the company and to enjoin the payment of dividends, to cause restitution of dividends and salaries, and to recover damages for transactions that could not be enjoined, rescinded, or cancelled. No restitution or damages, which are admittedly in personam-type judgments, are sought in the instant case.

It is also important to note that in *McQuillen* the Court merely refused to give relief of a personal nature in an in rem action without personal jurisdiction. All that is sought in the instant case are orders relating to rights in real property.

Finally, Petitioners contend that the policy expressed by this Court in *Olberding v. Illinois Cent. R.R.,* 346 U.S. 338, 74 S.Ct. 83, 98 L.Ed. 39 (1953) is applicable to the case at bar. The *Olberding* case dealt with the question of venue under 28 U.S.C.A. § 1391 (a) (1958). The Court stated that the requirement of venue under that statute is "specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." *Olberding, supra,* at page 340.

Respondent, however, submits that the decision and statements contained in *Olberding v. Illinois Cent. R.R., supra,* are not applicable to the instant case in that the venue here under consideration is under a different statute—28 U.S.C. § 1655 (1958). This section, it is submitted, was promulgated in an effort to expand upon Section 1391 (a) so as to allow actions involving rights to real or personal property to be brought where such property is located even though personal jurisdiction may not be afforded over the Defendants involved.

Certainly 28 U.S.C. § 1655 (1958) cannot be recklessly construed. However, to be unduly restrictive in its construction would severely limit the purposes of the statute, and, as

pointed out by the court below, such a construction would not comport with prior determinations of the Supreme Court of the United States and would not be in keeping with the spirit of modern Federal Court procedures.

The court below further pointed out that if venue under Section 1655 were not allowed under circumstances such as exist in the instant case, "but for the fortuity that both Defendants here happen to reside in the same state, such a holding would also deprive a Plaintiff in the position of the present Plaintiff from any Federal forum whatsoever, despite diversity of citizenship between Plaintiff and Defendants and the location within the district of the property which it is sought to reach." (Petition for Certiorari, page 27.)

CONCLUSION

On the basis of the foregoing argument and authority, it is submitted that the question herein involved is not of such significance and consequence as to warrant consideration by this Court and that there is in fact no conflict between the decision below and the decisions in other Circuits and that for these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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